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No. 91-1924

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

AYUDA, INC., *et al.*,

Petitioners,

v.

WILLIAM BARR, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the District of Columbia Circuit impermissibly restricted *McNary v. Haitian Refugee Center, Inc.*, 111 S.Ct. 888 (1991), by holding that legal challenges to Immigration and Naturalization Service legalization policies must be channeled, except in certain very limited procedural contexts, only through the courts of appeals in the context of review of individual deportation proceedings pursuant to 8 U.S.C. §1255a(f), thus leaving the district courts without jurisdiction to consider injunctive challenges to unlawful INS policies and afford effective interim and final relief?

2. Whether an INS legalization eligibility policy is sufficiently final and ripe for review, under *McNary* and *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), when that policy is based on an agency regulation, consistent policy directives and a uniform course of agency conduct, and when policy will not be further refined or formalized prior to the expiration of a deadline for seeking legalization?

PARTIES TO THE PROCEEDING

The parties in this Court are as follows:

Petitioners: Ayuda, Inc., the Ethiopian Community Center, Inc., Latin American Youth Center, Mexican American Legal Defense and Educational Fund, N.K. Doe, J.H. Doe, T.B. Doe, K.A.A. Doe and J.N.U. Doe.

Respondents: William P. Barr, individually and as Attorney General of the United States, Gene McNary, individually and as the Commissioner of the Immigration and Naturalization Service, and the Immigration and Naturalization Service.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Ayuda, Inc., et al., respectfully petition that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in this case on November 5, 1991.

OPINIONS BELOW

The majority opinion of a panel of the United States Court of Appeals for the District of Columbia Circuit, on remand from this Court, in *Ayuda, Inc. v. Thornburgh* is reported at 948 F.2d 742 (D.C. Cir. 1991), and reprinted in the Appendix to this Petition at page 1a ("App. 1a"). The dissenting opinion is reported at 948 F.2d at 760, App. 35a. The panel, by a 2-1 vote, subsequently denied Petitioners' Petition for Rehearing and the full Court of Appeals, by a 6-5 vote, denied Petitioners' Suggestion for Rehearing *En Banc* on March 3, 1992. The three opinions

covering the denial of the Suggestion for Rehearing *En Banc* are reported at 958 F.2d 1089 (D.C. Cir. 1992), App. 65a.

The original majority and dissenting opinions of the District of Columbia Circuit in *Ayuda, Inc. v. Thornburgh* (vacated and remanded by this Court at 111 S. Ct. 1068, App. 77a) are reported at 880 F.2d 1325 (D.C. Cir. 1989), App. 78a. The 2-1 denial by the panel of Petitioners' Petition for Rehearing and the four opinions which were filed in the 5-4 denial by the full Court of Appeals of Petitioners' Suggestion for Rehearing *En Banc* in that earlier case are not officially reported but may be found at *Ayuda, Inc. v. Thornburgh*, No. 88-5226 (D.C. Cir. Oct. 4, 1989) (available at 1989 U.S. App. LEXIS 10236), App. 165a.

The unanimous opinion of a panel of the District of Columbia Circuit denying Respondents' request for a Writ of Mandamus, *In Re: Richard Thornburgh*, is reported at 869 F.2d 1503 (D.C. Cir. 1989), App. 173a.

The original opinion of the United States District Court for the District of Columbia, *Ayuda, Inc. v. Meese*, is reported at 687 F.Supp. 650 (D.D.C. 1988), App. 203a. Supplemental Orders of the District Court follow immediately after that opinion, and further orders are reported at 700 F.Supp. 49 (D.D.C. 1988), App. 255a. The order of the District Court granting interim relief is reported at *Ayuda, Inc. v. Thornburgh*, 744 F.Supp. 21 (D.D.C. 1990), App. 279a. The order denying Petitioners' request to hold the government in contempt is not officially reported but may be found at *Ayuda, Inc. v. Thornburgh*, No. 88-0625 (D.D.C. June 29, 1989) (available at 1989 U.S. Dist. LEXIS 7497), App. 266a.

JURISDICTION

The judgment of the Court of Appeals was entered on November 5, 1991. A timely Petition for Rehearing and a Suggestion for Rehearing *En Banc* in the Court of Appeals were denied on March 3, 1992.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(a).

STATUTES AND REGULATIONS INVOLVED

The relevant statutory provisions and regulations involved in this proceeding are printed in the Appendix. They are: Immigration and Nationality Act ("INA") Sections 106, App. 290a; 210(e), App. 295a; 245A(a)(2), App. 297a; 245A(f), App. 298a; and 279 App. 301a (8 U.S.C. §§1105a, 1255a(a)(2), 1255a(f), and 1329 (1988), respectively); 28 U.S.C. §1331 (1988), App. 302a; former Section 265 of the INA, 8 U.S.C. §1305 (1976), App. 300a; and 8 C.F.R. §§245a.1(d) and 245a.2(b)(3) (1987), App. 303a.

STATEMENT OF THE CASE

Petitioners are before this Court once more to request review of a ruling by the United States Court of Appeals for the District of Columbia Circuit that the United States District Court for the District of Columbia was without jurisdiction to hear a challenge to regulations and policies of the Immigration and Naturalization Service ("INS"). In *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325 (D.C. Cir. 1989), App. 78a, (*"Ayuda I"*), *vacated and remanded*, 111 S.Ct. 1068 (1991), App. 77a, the D.C. Circuit vacated an order which had been entered by the district court two days before the May 4, 1988 statutory deadline for filing legalization applications. That order had enjoined the INS from denying legalization to certain nonimmigrant aliens who filed applications prior to the deadline and who otherwise met the applicable conditions for legalization, if the INS found that those aliens had established a willful violation of the reporting requirements of former INA Section 265, 8 U.S.C. §1305 (hereinafter "§265").[1] This Court

[1] Prior to January 1, 1982, there were three distinct reporting requirements for nonimmigrants under §265: an annual report every January on Form I-53, a report every 90 days on Form AR-11, and a report within ten days of every address change on Form AR-11. *See* 8 U.S.C. §1305 (1976). Therefore, Petitioners contended, as of January

vacated the D.C. Circuit's judgment in *Ayuda I* and remanded it for reconsideration in light of *McNary v. Haitian Refugee Center, Inc.*, 111 S.Ct. 888 (1991). *Ayuda, Inc. v. Thornburgh*, 111 S.Ct. 1068 (1991), App. 77a. In *McNary*, this Court held that the judicial and administrative review provisions of the Immigration Reform and Control Act ("IRCA") did not preclude review under 28 U.S.C. §1331 of challenges to INS practices and procedures in administering the legalization program.

On remand from this Court, the D.C. Circuit consolidated reconsideration of *Ayuda I* with two related cases. In the first related case, the district court ordered interim work authorization for potential beneficiaries of the *Ayuda* litigation. In the second, the district court denied a request to hold the government in contempt for violating a prior district court order. Notwithstanding this Court's decision in *McNary*, the D.C. Circuit again held in a 2-1 decision that the district court lacked jurisdiction to hear the challenges and issue its orders. The D.C. Circuit also found that the interim relief and contempt issues were essentially controlled by its original jurisdictional ruling. *Ayuda, Inc. v. Thornburgh*, 948 F.2d 742 (D.C. Cir. 1991) ("*Ayuda II*"), App. 1a.

The *Ayuda* suit was originally instituted in the district court on March 8, 1988, by four immigration counseling organizations, including two Qualified Designated Entities ("QDEs"),[2] and, as a class action, by five aliens, individ-

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1, 1982, the INS was able to determine by the nonexistence of these reports which aliens were in an unlawful status for failure to comply with the address reporting requirements of §265, because INS had records for all nonimmigrants showing their admission to the country.

[2] A Qualified Designated Entity is a non-profit organization, such as Petitioners Ayuda, Inc. and the Ethiopian Community Center, that contracts, *inter alia*, to receive and screen legalization applications pursuant to the Immigration Reform and Control Act of 1986, and to provide assistance and information to aliens seeking legalization benefits. The designation of these organizations to assume such a role derives from a Congressional grant of special status in the Immigration Reform and Control Act of 1986. *See* 8 U.S.C. §1255a(c); *Ayuda, Inc.*

ually, and on behalf of a class of others similarly situated.[3] The case involved the "known to the Government" provision of 8 U.S.C. §1255a(a)(2)(B). Under 8 U.S.C. §1255a(a)(2)(B), certain applicants who are "nonimmigrants" (i.e., persons who entered the United States lawfully prior to 1982 for a temporary period) are entitled to legalization if they had violated restrictions on their nonimmigrant status as of January 1, 1982, and if their resultant "unlawful status was known to the Government as of [January 1, 1982]."

Despite the plain statutory language and the Congressional order to the INS to implement legalization in a "liberal and generous fashion" so that "millions" of aliens living in the U.S. illegally since 1982 would "emerge from the shadows", 132 Cong. Rec. H. 9709 (Oct. 9, 1986), the INS issued regulations in May 1987 that narrowly defined "known to the Government" to require the aliens' presence to have been "known to the INS" prior to January 1, 1982. 52 Fed. Reg. 16205, 16206 (1987); 8 C.F.R. §245a.1(d) (1987). On September 22, 1987, the United States District Court for the Northern District of Texas, on a Motion for a Writ of *Habeas Corpus*, held that the INS regulations regarding the term "known to the Government" were inconsistent with IRCA and outside the scope of the INS authority. *Farzad v. Chandler*, 670 F.Supp. 690 (N.D. Tex. 1987). The INS disregarded this district court's holding and continued to use the May 1987

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v. Meese, 687 F.Supp. 650, 655-658 and n.4 (D.D.C. 1988), App. 213a-214a.

[3] The United States District Court for the District of Columbia found that the organizational plaintiffs had standing to challenge the INS regulation, and therefore it found it did not need to certify the class. On September 2, 1988, plaintiffs before the district court sought to amend the Complaint for Injunctive and Declaratory Relief to add as individual plaintiffs certain aliens who had been or would be denied legalization benefits because their claims were based upon §265 violations. At that time, plaintiffs also moved for class certification. Both motions remain pending.

regulation without modification. Petitioners therefore filed this action.[4]

On March 30, 1988, the district court rejected the INS definition of the phrase "known to the Government" as violative of the "crystal clear" statutory language, as well as the "broad remedial purpose" of the statute. *Ayuda, Inc. v. Meese*, 687 F.Supp. 650, 661-63 (D.D.C. 1988), App. 226a-231a.[5] The district court therefore declared the INS regulation to be contrary to law. *Id.* at 666, App. 237a. The INS later acquiesced in this ruling (and the first three Supplemental Orders entered in the case) and did not appeal the decision. *See* "Defendant's Opposition to Plaintiffs' Motion for Entry of Supplemental Order VIII" filed May 17, 1988, at page 9.

On April 21, 1988, a Motion to Intervene as Plaintiffs, with a Proposed Complaint, was filed by an additional group of immigration counseling organizations ("Proposed Intervenors"). Proposed Intervenors asserted that aliens who had failed to file annual or quarterly registration reports with the INS, pursuant to §265, were also eligible for legalization under the "known to the Government" provision, because their violation, which constituted a deportable offense, made their unlawful status "known to the Government". Plaintiffs incorporated as their own the arguments and evidence presented by the Proposed Intervenors.[6] The uncontroverted evidence included documen-

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[4] The first count of the Complaint asserted that the INS regulation at 8 C.F.R. §245a.1(d) violated the statutory terms of 8 U.S.C. §1255a(a)(2)(B), and was arbitrary, capricious, and in excess of statutory authority under the Administrative Procedure Act. The second count asserted a constitutional claim—that the regulation, and the INS's policies and practices pursuant to that regulation, violated the Fifth Amendment to the United States Constitution.

[5] Because the district court found the regulation to be inconsistent with IRCA and thus outside the scope of the INS' authority, the court necessarily did not reach the issue of whether the regulation and the practices and procedures of the INS violated the Constitution.

[6] *See* "Plaintiff's Motion to Admit Additional Co-Counsel" filed on April 28, 1988, at 1. The Motion was granted by the district court on

tation of the INS' uniform refusal to consider a §265 violation as "known to the Government".[7]

On May 2, 1988—two days prior to the May 4, 1988, filing deadline for legalization applications—the district court entered Supplemental Order V which enjoined the INS from denying legalization to nonimmigrant aliens who failed to comply with the mandatory quarterly or annual registration requirements of §265, if the INS determined that such aliens credibly established their willful violation of §265, and also met all other applicable conditions for legalization. *Ayuda, Inc. v. Meese*, 687 F.Supp. at 668, App. 241a. On July 5, 1988, Respondents filed a Notice of Appeal.[8]

A panel of the D.C. Circuit, in a 2-1 decision, vacated Supplemental Order V. *Ayuda I*, 880 F.2d 1325, App. 78a. On October 4, 1989, Petitioners' Petition for Rehearing and Suggestion for Rehearing *En Banc* were denied by a divided vote, App. 165a, and Petitioners subsequently filed a Petition for a Writ of Certiorari with this Court.

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the same day as it was filed. *See also* note 1 to "Plaintiffs' Memorandum in Reply to Defendants' Opposition to Intervenors' Motion to Compel Compliance and/or Modify Permanent Injunctions," filed on May 2, 1988.

[7] Along with the Motion to Admit Additional Co-Counsel, on April 28, 1988, Plaintiffs filed fifteen affidavits from individuals and QDEs, many of which discussed the §265 theory of eligibility for legalization. *See* "Notice of Evidence of Defendants' Failure to Comply with the Court's Orders and Renewal of Request to Toll May 4, 1988 Filing Deadline." Further affidavits and declarations were filed the next day, on April 29, 1988.

[8] Respondents appealed certain parts of Supplemental Order V, as well as parts of Supplemental Orders IV and VII. On December 1, 1988, Respondents filed a motion to withdraw those portions of their appeal which dealt with Supplemental Orders IV and VII. This Motion was granted on December 16, 1988. In between the filing of the Notice of Appeal and the Motion for Partial Withdrawal, Respondents filed, on November 18, 1988, a Petition for Writ of Mandamus in the court of appeals covering Supplemental Orders XI and XII, which established a Special Master procedure for certain aliens who failed to file legalization applications on or before May 4, 1988. These aliens include the

On February 20, 1991, this Court decided *McNary v. Haitian Refugee Center*, *supra*, and, four days later, vacated and remanded *Ayuda I* for reconsideration in light of *McNary*. *Ayuda, Inc. v. Thornburgh*, *supra*, App. 77a. On remand, writing for the majority, Circuit Judge Silberman held once again that the judicial review provisions of IRCA precluded district court review. The majority stated that *McNary* merely created an exception to a general preclusion, allowing only for district court review under § 1331 of collateral challenges to the legalization program. *Ayuda II*, 948 F.2d at 753, App. 19a-21a. The majority also held that the INS' §265 policy was not ripe for review, notwithstanding an INS regulation and other policy statements which precluded §265 claims. *Id.* at 754-56, App. 21a-24a. Circuit Judge Wald filed a dissent in which she stated that *McNary* controlled the jurisdictional issues in *Ayuda* and, consequently, IRCA did not preclude the district court's exercise of jurisdiction. *Id.* at 763-65, App. 41a-44a. In addition, Judge Wald stated that the ripeness doctrine did not divest the district court of jurisdiction to consider the challenge to the INS' §265 policy. *Id.* at 769-772, App. 54a-60a.

Petitioners subsequently filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*. On March 3, 1992, the panel, by a 2-1 vote, denied the Petition for Rehearing. At the same time, by a 6-5 vote, the full court of appeals denied the Suggestion for Rehearing *En Banc*. Three opinions issued. *Ayuda, Inc. v. Thornburgh*, 958 F.2d 1089 (D.C. Cir. 1992) (*en banc*), App. 65a.

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non-registrant aliens who did not receive notice of the May 2 Supplemental Order V in time to file their legalization applications on or before the May 4, 1988 deadline. Following argument, a panel of the D.C Circuit, in a unanimous opinion issued on March 3, 1989, refused to grant the writ of mandamus, holding that the case "in its present posture does not clearly fail to present a case or controversy, and the district court's continued exercise of jurisdiction does not violate the judicial review provisions of the IRCA." *In Re Thornburgh*, 869 F.2d 1503, 1517 (D.C. Cir. 1989), App. 202a.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit has issued an important decision that has a significant chilling effect on the rights of immigrants and immigrant rights organizations to challenge regulations and policies of the INA. In effect, the D.C. Circuit has foreclosed all district court review of statutory and constitutional challenges to INS legalization rules.

This decision directly contravenes this Court's ruling in *McNary v. Haitian Refugee Center, Inc.*, 111 S.Ct. 888 (1991), as well as provisions of the IRCA. In addition, the ruling is in direct conflict with the Ninth Circuit's ruling in *Catholic Social Services, Inc. v. Thornburgh*, 956 F.2d 914 (9th Cir. 1992), and this conflict is the basis for the Petition for a Writ of Certiorari filed by the Solicitor General in that case on May 13, 1992. Furthermore, the D.C. Circuit's decision conflicts with a holding of the Seventh Circuit in *Morales v. Yeutter*, 952 F.2d 954 (7th Cir. 1991). *Ayuda II* is also in conflict with more than twenty years of jurisprudence—including decisions from this Court—construing 8 U.S.C. §1105a not to preclude a district court's general federal question jurisdiction over challenges to INS rules and policies.[9] The D.C. Circuit reversal on jurisdictional grounds of a district court interim order granting temporary work authorization also contravenes *McNary*. Finally, *Ayuda II's* holding that the case was not ripe for review runs contrary to this Court's *McNary* ruling as well as the principles of *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). Review by this Court is therefore warranted.

1.a. The decision of the panel majority in *Ayuda II* on the preclusion of district court jurisdiction over challenges to

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[9] IRCA's administrative and judicial review provisions provide for judicial review of legalization denials only in the context of 8 U.S.C. §1105a. *See* 8 U.S.C. §1255a(f). 8 U.S.C. §1105a, a provision of the INA which has been in existence since 1961, allows for judicial review of final orders of deportation in the courts of appeals. Numerous court decisions have held that §1105a is not a bar to district court jurisdiction over broad-based statutory and constitutional challenges to INS rules and policies. *See infra* at pp. 20-21.

INS rules subverts the clear holding of this Court in *McNary v. Haitian Refugee Center, Inc.*, *supra*. IRCA's judicial review provisions relating to the general legalization program apply, by their terms, only to "a determination respecting an application" for legalization. 8 U.S.C. §1255a(f). These provisions create a single level of administrative appellate review, the Legalization Appeals Unit ("LAU"), and state that such review is to be "based solely upon the administrative record established at the time of the *determination on the application*" and any additional evidence not available at the time of that determination. 8 U.S.C. §1255a(f)(3)(B) (emphasis added).

In *McNary*, this Court considered the preclusory effect of the identical statutory language, 8 U.S.C. §1160(e)(1), the judicial review provisions relating to IRCA's Special Agricultural Worker ("SAW") program.[10] Relying on the "ordinary and obvious meaning" of the statutory language, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987), this Court concluded:

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[10] On previous occasions the Solicitor General has argued to this Court that the jurisdictional issues in *Ayuda* and *McNary* are identical:

> In each case, the critical issue was whether the general federal question jurisdiction of the district courts was available for a challenge to "rules" or "policies," despite the detailed provisions governing judicial review in IRCA . . . Although the decision below involved an APA challenge to a rule promulgated by the INS, and the plaintiffs in [*McNary*] challenged policies that were alleged to be tantamount to rules, we agree with petitioners that the cases are not distinguishable on that basis.

Op. Cert. in *Ayuda I* at 16.

> Although *Ayuda* involved review of a regulation (as opposed to the challenge to "policies and practices" here), the same principles are controlling in both situations. In both cases, the core inquiry is whether Congress intended to permit district court review of challenges to general policies adopted by INS in administering the legalization programs.

Pet. for Cert. in *McNary* at 28.

> Significantly, the reference to "a determination" describes a single act rather than a group of decisions or a practice or procedure employed in making decisions. Moreover, when [the statute] further clarifies that the only judicial review permitted is in the context of a deportation proceeding, it refers to "judicial review of *such a denial*"—again referring to a single act, and again making clear that the earlier reference to "a determination respecting an application" describes the denial of an individual application.

McNary, 111 S. Ct. at 896 (emphasis in original).

This Court also found that the standard of review contained in IRCA's judicial review provisions supported its literal interpretation of those provisions:

> [T]he "abuse of discretion" standard of judicial review . . . would make no sense if we were to read the Reform Act as requiring constitutional and statutory challenges to INS procedures to be subject to its specialized review provision. Although the abuse-of-discretion standard is appropriate for judicial review of an administrative adjudication of the facts of an individual application for SAW status, such a standard does not apply to constitutional or statutory claims, which are reviewed *de novo* by the courts. [This] language thus lends substantial credence to the conclusion that the Reform Act's review provision does not apply to challenges to INS's practices and procedures in administering the SAW program.

McNary, 111 S. Ct. at 897. The *McNary* decision therefore interprets IRCA's specialized judicial review provisions as limited to individual denials of legalization applications, leaving intact the district court's general federal question jurisdiction under 28 U.S.C. §1331 as well as under the

INA, to decide general statutory and constitutional challenges to INS rules and policies.[11]

Following this Court's remand in *Ayuda I*, rather than accepting this plain interpretation, the *Ayuda* majority persisted in its view that these provisions were preclusive and read *McNary* as having created only a narrow exception. This "*McNary* exception", *Ayuda II*, 948 F.2d at 753, App. 19a, would permit district court review of "a collateral issue, typically a procedural practice", *only* when the issue "cannot be adequately presented to the courts of appeals." *Id.* By thus circumscribing the reach of *McNary*, the *Ayuda* majority achieves the desired result of removing *Ayuda* from *McNary's* holding.

The *Ayuda* majority creates, and imputes to *McNary*, a new and completely different bifurcation of legalization claims, not at all sanctioned by this Court's analysis of the plain statutory language. According to the majority's distinction, legalization applicants are foreclosed from challenging in federal district court an unconstitutional prac-

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[11] Along with the broad grant of jurisdiction over federal questions found in 28 U.S.C. §1331, the INA grants district courts broad jurisdiction over "all causes . . . arising under any of the provisions of this subchapter." 8 U.S.C. §1329. Indeed, this Court in *McNary* pointed out the sharp contrast between the narrowly drawn language of IRCA's judicial review provisions and the broad grant of jurisdiction in §1329:

> [H]ad Congress intended the limited review provisions of §210(e) of the INA to encompass challenges to INS procedures and practices, it could easily have used broader statutory language. Congress could, for example, have modeled §210(e) on the more expansive language in the general grant of district court jurisdiction under Title II of the INA by channeling into the Reform Act's special review procedures "all causes . . . arising under any of the provisions of the legalization program. It moreover could have modeled §210(e) on 38 U.S.C. §211(a), which governs review of veterans' benefits claims, by referring to review "on all questions of law and fact" under the SAW legalization program.

111 S. Ct. at 897. The *Ayuda* majority disregards this point completely.

tice or unlawful regulation if that practice or regulation is the same "core issue of law that they will encounter in a legalization proceeding." *Ayuda II*, 948 F.2d at 749, App. 12a. Furthermore, in the *Ayuda* majority's view, district court review is appropriate only in those instances where adequate review is not available from the courts of appeals in the context of deportation proceedings. Because, according to the majority, the §265 issue could be addressed by a court of appeals—albeit on an as-applied basis in the context of 8 U.S.C. §1105a(a), in a deportation proceeding commenced perhaps years after the end of the legalization program—district court review of the §265 issue as an unlawful agency policy was unavailable. *Id.* at 749-750, App. 13a-14a.

This analysis would, in effect, substitute 8 U.S.C. §1255a(f) and 8 U.S.C. §1105a for the general jurisdictional grant of 8 U.S.C. §1329, and, for cases arising under IRCA, render meaningless the grant of federal question jurisdiction in 28 U.S.C. §1331. Additionally, forcing broad-based statutory and constitutional challenges to the legalization program through the review machinery set up by IRCA to deal with *individual* fact-specific denials would mean, in practice, that INS rules and policies could never be reviewed outside of the legal context of a set of facts pertaining to one individual claim, and a general and broadly applicable injunctive remedy for unlawful agency action would never be afforded.

The majority's distinction is directly contrary to this Court's careful delineation between individual legalization denials and general statutory and constitutional challenges to the legalization program. The jurisdictional test mandated by the *Ayuda* majority is neither required by the statute nor supported by the legislative history of IRCA. And it is certainly not evident from, or even remotely suggested by, *McNary*.[12] Petitioners therefore urge this

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[12] Such a test also inevitably leads to inconsistent decisions with respect to jurisdiction. An excellent example of this is *Morales v. Yeutter*, *supra*, discussed *infra*. In *Morales*, the Seventh Circuit found that the

Court to grant their Petition for a Writ of Certiorari to resolve this contravention of the *McNary* decision.[13]

1.b. Essential to this Court's conclusion in *McNary* was its finding that meaningful judicial review of the claims

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district court had jurisdiction to hear a challenge to a determination by the Secretary of Agriculture that sod is not a perishable commodity, thereby rendering sod workers ineligible for SAW status. Under the *Ayuda* majority's analysis, however, district court jurisdiction would have been precluded, as the definition of sod would certainly have been at the heart of many legalization denials and could have been considered, as applied to a particular SAW application, by the court of appeals in the context of a deportation appeal. As this example illustrates, it is difficult to imagine any challenge to an INS regulation or policy that would survive the *Ayuda* majority's jurisdictional test and gain judicial review in a district court under §1331.

[13] Having created a bifurcation between "collateral" claims and those that go "to the heart of an applicant's claim", *Ayuda II*, 948 F.2d at 749, App. 12a, the majority proceeds to reformulate Petitioners' challenge to the §265 policy as an "obvious effort to adjudicate the plaintiff aliens' ultimate eligibility for legalization." *Id.* at 749, App. 12a. In fact, the Petitioners simply sought an order requiring the INS to adjudicate legalization applications under standards that were constitutionally valid and statutorily correct. (*See* Complaint at Prayer for Relief ¶¶3, 4a, 4b). That was precisely the relief provided in Supplemental Order V, which

> enjoined [the INS] from denying legalization to nonimmigrant aliens who contend that they violated their nonimmigrant status prior to January 1, 1982 by failing to comply with the mandatory quarterly or annual registration requirements of [§265], if INS determines that such aliens have credibly established their willful violation of Section 265, and such aliens have also met all other applicable conditions for legalization.

Ayuda, Inc. v. Meese, 687 F.Supp. at 668, App. 242a. Just as in *McNary*, "if allowed to prevail in this action, [plaintiffs in *Ayuda*] would only be entitled to have their case files reopened and their applications reconsidered in light of the newly prescribed INS procedures." *McNary*, 111 S.Ct. at 898.

In its analysis, the *Ayuda* majority virtually ignores the well-established principles laid down by this Court in *International Union, UAW v. Brock*, 477 U.S. 274 (1986) and *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986). As in *Ayuda*, the statutes at issue in *UAW* and *Bowen* both concerned review of individual deter-

of the SAW applicants would be precluded, were the claims channelled through IRCA's review provisions. Notwithstanding this Court's concern for meaningful review, the *Ayuda* majority would require an individual to go through a series of time-consuming, burdensome and futile administrative procedures before an unlawful INS legalization policy could be judicially reviewed.

Under the *Ayuda* approach, an individual alien seeking to bring a purely legal statutory or constitutional challenge to the INS' legalization policies would be required to: (1) make a necessarily futile application for legalization, which, as even the *Ayuda* majority recognized, required a "hefty" application fee, *Ayuda II*, 948 F.2d at 751, App. 15a; (2) appeal the resulting denial to a LAU that lacks authority to consider the merits (and thus rule in the alien's favor) on a statutory or constitutional claim;[14] (3) waive the sta-

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minations of eligibility for certain program benefits, and were held not to preclude §1331 review of rules and policies. In this regard, the language of this Court in *UAW* is directly applicable to the facts of *Ayuda*:

> This action is not an appeal from an adverse benefit determination, removed to federal court. It is a challenge to the [substantive] federal guidelines that required those determinations.

477 U.S. at 291.

The *Ayuda* majority's attempt to analogize this case to *Heckler v. Ringer*, 466 U.S. 602 (1984), must also fail. *Ayuda II*, 948 F.2d at 749, App. 12a. This Court in *McNary* distinguished *Ringer* on exactly the same grounds upon which it is inapplicable here. Unlike the INS policy challenged in *Ayuda*—which, if overturned would necessitate readjudication of individual applications *by INS*—success in the *Ringer* case would have had "the practical effect of deciding [the respondents'] claims for benefits on the merits." *McNary*, 111 S.Ct. at 897. *Ringer* also involved much broader statutory language, precluding judicial review under §1331 of "any claim arising under" the Medicare Act, which clearly encompasses a greater variety of legal challenges than the narrowly drawn 8 U.S.C. §1255a(f).

[14] *See Ayuda I, supra*, 880 F.2d at 1332 n.6, App. 90a ("only courts would likely declare a regulation invalid as applied"); *id.* at 1332 n.7, App. 91a ("facial challenges to the regulation [in a proceeding before the LAU] are not permitted"); *Matter of Fede*, Interim Dec. 3106 at

tutory right to confidentiality by voluntarily surrendering to the INS,[15] or wait to be apprehended by the INS for initiation of deportation proceedings (which the INS in its discretion could choose *not* to initiate—thus precluding judicial review altogether);[16] (4) appear before an immigration judge, who is prevented by regulation from reviewing the legalization denial;[17] (5) be issued an order of deportation and then file an appeal to the Board of Immigration Appeals, also barred from reviewing the denial;[18] (6) file for review in a court of appeals that lacks an adequate record for reviewing the claim; and (7) be deprived of "employment authorization," and thus have no legal right to work in this country throughout this entire lengthy period.[19]

2-3 (BIA 1989) and cases cited ("[a] regulation promulgated by the Attorney General has the force and effect of law as to this Board and immigration judges, and neither has any authority to consider challenges to regulations implemented by the Attorney General, any more than there is authority to consider constitutional challenges to the laws we administer").

[15] *See* 8 U.S.C. §1252, §1255a(c)(4), (5); *see also* S. Rep. No. 132, 99th Cong., 2d Sess. 47 (1986) (Congress created the QDE confidentiality provision to encourage aliens to come forward "without fearing that their applications would be forwarded to the INS. . ."); H. Rep. No. 682 (I), 99th Cong., 2d Sess. 73 (1986). *See also McNary*, 111 S.Ct. at 892.

[16] *See Ayuda II*, 948 F.2d at 767-768 n.8, App. 51a (Wald, J., dissenting) ("[i]t is conceivable that a problematical ruling in legalization proceedings could escape review completely if the government chose not to initiate deportation in all such cases.")

[17] *See* 8 C.F.R. §103.3(a)(3)(iii), App. 306a ("[n]o further administrative appeal shall lie from this decision, nor may the application be filed or reopened before an immigration judge or the Board of Immigration Appeals during exclusion or deportation proceedings").

[18] *Id.*

[19] *See McNary*, 111 S.Ct. at 895. Because Congress did not intend its newly-enacted employer sanctions provisions to cause hardship to aliens who *were* eligible for legalization, Congress provided employment authorization to any alien who could establish a "prima facie" case of legalization eligibility. 8 U.S.C. §1255a(e)(2)(B); *see also* 8 U.S.C. §1255a(e)(1).

Clearly, the impracticality of these procedures would preclude all meaningful review of a substantive challenge to INS legalization policies. Indeed, to require an applicant to initiate judicial review of unlawful INS action by *volunteering for deportation* was found by this Court to be "tantamount to a complete denial of judicial review for most undocumented aliens." *McNary*, 111 S.Ct. at 898. The alternative—to await institution of deportation proceedings by the INS—could well mean that it would be years before any substantive challenge to INS legalization policies would be heard.[20] Even if a broad change in INS policy could result at that point, it would certainly be much too late, in view of the application deadline, to redress the injury to other applicants.[21] Such a foreclosure of meaningful review is patently inconsistent with *McNary*, and Petitioners therefore urge this Court to grant their Petition to resolve it.

1.c. A clear conflict exists between the D.C. Circuit and the Ninth and Seventh Circuits over the applicability of *McNary* to broad-based challenges to rules and policies. The *Ayuda* majority's narrow reading of *McNary* directly conflicts with the decision of the Ninth Circuit in *Catholic Social Services, Inc. v. Thornburgh, supra* ("*CSS*"). *CSS* was a consolidated appeal involving two separate district court actions. In one, a class of aliens and immigrant rights groups challenged in district court the INS' administration of an IRCA provision concerning casual and innocent absences from the United States. In the second action, individual aliens and immigrant organizations challenged in district court the validity of an INS regulation concerning

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[20] This alternative would also seriously undercut one of the primary legislative goals of the legalization program: To remedy the problem of an illegal population which the INS had neither the time nor the resources to handle through the deportation process. *See McNary*, 111 S.Ct. at 891, n.4.

[21] This is especially true for applicants who failed to file by the application deadline because, in the *Ayuda* majority's view, such applicants have no judicial remedy available whatsoever. *See Ayuda II*, 948 F.2d at 758, App. 30a-31a, and *infra* at pp. 23-24.

fraudulent reentry. The government conceded the merits and argued on appeal that 8 U.S.C. §1255a(f) precluded district court jurisdiction.

The Court of Appeals for the Ninth Circuit flatly rejected the government's argument, stating:

> All of the court's considerations in *McNary* apply with equal force in the instant case. The references in §1255a(f) to "a determination respecting an application," 8 U.S.C. §1255a(f)(1), and to a "denial of adjustment of status," 8 U.S.C. §1255a(f)(2), are relevant to an individual legalization determination, but not to a case such as this one where the INS's regulations are being challenged. Moreover, the administrative record and appeals process would be of no help in addressing the constitutional and statutory claims brought in this case. If Congress wanted the IRCA review provisions to apply to challenges of INS regulations implementing IRCA, it could have used broader statutory language.

956 F.2d at 920. Moreover, the Ninth Circuit plainly refused to follow the *Ayuda* interpretation of *McNary*:

> In reaching its decision, the *Ayuda* majority concluded that *McNary* does not draw a distinction between individual and class-wide claims, but instead draws "a distinction between collateral issues (which might normally be procedural) and those that go to the heart of an applicant's claim." *Id.* at 749. We find no basis for such an interpretation of *McNary*. *The Supreme Court in McNary did not draw a distinction between collateral issues and issues that go to the heart of the claim.*
>
> The Court did, however, hold that IRCA's SAW review provisions apply "only to review of denials of *individual* SAW applications." *McNary*, 111 S.Ct. at 897 (emphasis added). As discussed above, the review provisions in section

> 1255a(f) refer only to determinations of individual applications. We therefore hold that section 1255a(f) does not apply to this case.

Id. at 921 (emphasis added) (footnote omitted).

The Solicitor General concedes that *Ayuda II* and *CSS* are in conflict. On May 13, 1992, the Solicitor General filed a Petition for a Writ of Certiorari in *CSS*, now captioned *Barr v. Catholic Social Services*, Docket No. 91-1826. In that Petition, the Solicitor General began his argument on the split in the Circuits by stating that "The Ninth Circuit's decision squarely conflicts with that of the D.C. Circuit in *Ayuda* . . . ." (Petition at 15.) He then supported this argument by reviewing the two cases in detail, concluding that "[t]his Court should grant certiorari to resolve the conflict." (Petition at 16.)

The decision of the Court of Appeals for the Seventh Circuit in *Morales v. Yeutter*, *supra*, also presents a conflict with *Ayuda*. As discussed *supra* at n.12, *Morales* involved a suit by sod farmers and their undocumented alien employees to invalidate a Department of Agriculture regulation that excluded sod from the perishable commodities encompassed by the SAW program. The regulation effectively rendered sod workers ineligible for SAW status.

Writing for the Seventh Circuit, Judge Posner adopted this Court's analysis of the language and purpose of IRCA's judicial review provisions:

> [I]t is apparent from the language of the provision and from the character of immigration proceedings, and was so held by the Supreme Court in . . . [*McNary*], that the provision is limited to cases brought by a worker whose application for adjustment of status under the SAW program is turned down. Either remedy presupposes a valid regulation defining entitlement to SAW status, so that the issue is merely whether the alien qualifies for an adjustment of status under the regulation. It is unlikely that Congress thought a deportation or habeas corpus proceeding an apt

> vehicle for determining the validity of a general regulation affecting an entire agricultural industry. The familiar and by now traditional method for obtaining such a determination is to bring an injunctive suit in federal district court under 28 U.S.C. §1331, the grant of federal question jurisdiction. We have no reason to suppose that Congress wanted to displace that method merely because it decided to channel judicial review of denials of individual applications for adjustment of status under the SAW program through the usual routes by which aliens obtain judicial review.

952 F.2d at 956-957.

In stark contrast to *Ayuda*, the *Morales* court clearly did not believe that the fact that the challenged regulation would have been determinative of SAW eligibility in an individual case precluded district court review of the regulation. It also found judicial review under IRCA inadequate to decide the validity of a regulation. *Id.*

The *Ayuda II* decision is also at odds with over twenty years of jurisprudence firmly establishing federal question jurisdiction of district courts over challenges to INS policies and rulemaking, notwithstanding the provisions of 8 U.S.C. §1105a, which is expressly incorporated in 8 U.S.C. §1255a(f). In *Cheng Fan Kwok v. INS*, 392 U.S. 206, 209-210 (1968), this Court reviewed the scope of §1105a and concluded that this statutory provision

> .... vest[s] in the courts of appeal exclusive jurisdiction to review final orders issued by specified federal agencies. In situations to which the provisions of [this] Section ... are inapplicable, the alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court.

In essentially nullifying the use of 28 U.S.C. §1331 and 8 U.S.C. §1329 for injunctive challenges to rules and policies

under IRCA, the *Ayuda* majority undermines this fundamental principle of immigration jurisdictional law.[22]

The conflict among the circuits over the applicability of *McNary* to challenges to the rules and policies governing the legalization program is manifest, as is *Ayuda II's* inconsistency with the body of case law governing §1105a. Petitioners therefore urge that this Court grant their Petition for Writ of Certiorari in order to settle the conflict among the federal courts over this important question.

1.d. Plainly at odds with the holdings of *McNary*, *CSS* and *Morales* is the *Ayuda* majority's conclusion that the district court was without jurisdiction to order the INS to grant temporary work authorization or any other relief to potential beneficiaries of the *Ayuda* litigation, pending the outcome of *McNary*. Clearly, if the district court had ju-

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[22] *See Jean v. Nelson*, 711 F.2d 1455, 1502-05 (11th Cir. 1983), and *Jean v. Nelson*, 727 F.2d 957, 979-981 (11th Cir. 1984) (*en banc*), *aff'd on other grounds*, 474 U.S. 846 (1984); *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1032-33 (5th Cir. 1982) and its progeny. *See also Campos v. Nail*, 940 F.2d 495 (9th Cir. 1991); *Salehi v. District Director*, 796 F.2d 1286, 1290 (10th Cir. 1986); *Jaa v. INS*, 779 F.2d 569, 571 (9th Cir. 1986); *Abdelhamid v. Ilchert*, 774 F.2d 1447, 1450 (9th Cir. 1985); *Orantes-Hernandez v. Smith*, 541 F.Supp. 351, 364 (C.D. Cal. 1982); *Narenji v. Civiletti*, 481 F.Supp. 1132 (D.D.C.), *rev'd on other grounds*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied* 446 U.S. 957 (1980); *Andres v. INS*, 460 F.2d 287 (6th Cir. 1972); *Butterfield v. INS*, 409 F.2d 170, 173-74 (D.C. Cir. 1969); *Tai Mui v. Esperdy*, 371 F.2d 772 (2d Cir. 1966), *cert. denied*, 386 U.S. 1017 (1967).

The *Ayuda* majority's analysis of IRCA's judicial review provisions is also inconsistent with that of numerous other federal courts which have addressed those provisions. *See Proyecto San Pablo v. INS*, 784 F.Supp. 738 (D. Ariz. 1991); *Vargas v. Meese*, 682 F.Supp. 591, 597-598 (D.D.C. 1987); *Doe v. Nelson*, 703 F.Supp. 713, 720-22 (N.D. Ill. 1988); *Immigration Assistance Project v. INS*, 709 F.Supp. 998, *judgment amended*, 717 F.Supp. 1444 (W.D. Wash. 1989); *Zambrano v. INS*, No. S-88-455 EJG (E.D. Cal. 1988); *Farzad v. Chandler*, *supra*; *Perales v. Meese*, 685 F.Supp. 52 (S.D. N.Y.), *affirmed*, 847 F.2d 55 (2d Cir. 1988); and *United Farmworkers v. INS*, No. 87-1964-LKK (E.D. Cal. 1988). In each of these cases, the court rejected the INS's argument that IRCA requires exclusive review of INS rules in the court of appeals following orders of deportation.

risdiction to consider injunctive challenges to eligibility requirements, it had authority to fashion appropriate temporary and permanent injunctive relief. But the *Ayuda* majority erroneously manipulates the request for interim relief into an individual claim for legalization benefits. This manipulation is, perhaps, the clearest example of the *Ayuda* majority's persistent effort to reshape the claims for relief in *Ayuda* so that they fit into the "individual claims" division of its peculiar jurisdictional model.

The *Ayuda* majority holds that, because aliens who are prima facie eligible for legalization are entitled to work authorization, it must follow that the district court's order mandating interim work authorization was, in fact, an adjudication of the merits of individual legalization applications. *Ayuda II*, 948 F.2d at 742, App. 29a. Yet the mere fact that a benefit such as work authorization is attendant upon a prima facie eligible legalization application does not mean that a district court is barred from mandating a similar benefit in a completely separate legal context and for a different purpose. In fact, the district court's order of work authorization was entirely within its equitable power to preserve the status quo and allow the *Ayuda* claimants to survive—literally—pending the outcome of complex and lengthy litigation.[23] And it is beyond dispute that the district court's order conferred only short term work permission—not temporary residency and eventual eligibility for U.S. citizenship, two benefits of a successful legalization application.

In a similar way, the original district court injunction in *McNary* ordered the INS to "issue temporary work authorization to all class members pending the final outcome of the proceedings in this case and a final decision on the merits of their individual cases. . . ." *Haitian Ref-*

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[23] *See Lemon v. Kurtzman*, 411 U.S. 192, 200-201 (1973) ("equitable remedies are a special blend of what is necessary, what is fair, and what is workable. . . In equity, as no where else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests").

ugee Center, Inc. v. Nelson, 694 F.Supp. 864, 881 (S.D. Fla. 1988). Notwithstanding the fact that temporary work authorization was part of the injunctive relief granted by the lower court, this Court still found that the applicants' claims were in the nature of statutory and constitutional challenges rather than challenges to individual determinations. Therefore, as this Court apparently implicitly recognized, granting interim work authorization is clearly not tantamount to granting legalization or SAW status and—like the injunctive challenge itself—is properly within the district court's jurisdiction.

Even more problematic is the *Ayuda* majority's assertion that the request for interim work authorization could be adequately addressed through IRCA's judicial review provisions. Presumably referring to claims—including interim work authorization—by aliens who were dissuaded or prevented from filing timely legalization applications, the *Ayuda* majority states:

> We see no reason why the courts of appeals would encounter any unusual difficulty in considering the propriety of the INS' interpretation of Section 1255a to allow or disallow late or "constructive" filings. . . . And the courts of appeals are clearly able to afford plaintiffs whatever relief—legal or equitable—their claims merit.

Ayuda II, 948 F.2d at 757. App. 29a.

Nonetheless, in the discussion immediately following this statement, the *Ayuda* majority concludes that the district court had no jurisdiction to consider the request for any remedial claim because of 8 U.S.C. §1255a(f)(2), which provides that a denial of a late-filed legalization application may not be reviewed by any court of the United States. *Id.* at 758, App. 30a-31a.[24] Even assuming that the *Ayuda*

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[24] The *Ayuda* majority's expansive reading of 8 U.S.C. §1255a(f)(2) to preclude the interim (and presumably any final) relief awarded by the district court is completely inconsistent with the clear statutory language. 8 U.S.C. §1255a(f)(2) specifically and plainly disempowers a

majority is correct in equating the request for interim relief with a review of a denial of an untimely legalization claim, *under the majority's own analysis*, the issue of allowing constructive late legalization filings and interim equitable relief can never be raised before a court of appeals. This fundamentally inconsistent approach to the adequacy of review of the claims for interim and final relief—an approach which, in the end, forecloses judicial review entirely—directly contravenes the holding of *McNary*.

2. The *Ayuda* majority's flawed interpretation of *McNary's* jurisdictional holding likewise creates fatal defects in its ripeness analysis. The majority refuses to recognize that the §265 policy was at least as final as the policies and practices at issue in *McNary* and presupposes, in its cursory review of the hardship to the parties, that the district court was without jurisdiction to consider that policy. Thus the majority's ripeness holding does not withstand scrutiny.

As this Court has recognized, an agency action is ripe for review when it is a final action which creates a dilemma for a party who must choose between disadvantageous compliance with that action and risking sanctions or penalties by noncompliance. This Court in *Abbott Laboratories v. Gardner*, *supra* at 149, established a two-part test for ripeness. A lower court must consider "both the fitness of the issue for judicial decision and the hardship to the parties of withholding court consideration." The fitness inquiry comprehends several factors, including whether the agency's action is sufficiently final, whether the issue presented is a purely legal one, and whether consideration of the issue would benefit from a more concrete setting. *See Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581-582 (1985); *see also Ciba-Geigy Corp. v. U.S.E.P.A.*, 801 F.2d 430, 435 (D.C. Cir. 1986).

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federal court from reviewing a *denial* of a legalization application based upon a late filing. The district court in *Ayuda* had no such denial before it, but rather a general request for temporary equitable relief for the entire group of potential beneficiaries of this litigation.

INS action with respect to §265 was clearly final when the plaintiffs brought the issue before the district court. The policy of the INS was evidenced by a final regulation[25] setting forth eligibility criteria,[26] a series of official INS

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[25] Notwithstanding the *Ayuda* majority's assertion that INS could not "reasonably have been expected, to announce in advance of the receipt of applications its position in all the many, perhaps infinite, variations of legal issues that could arise in the interpretation of IRCA", *Ayuda II*, 948 F.2d at 754, App. 23a, it is a fact that the §265 eligibility criterion had been advocated during the rulemaking process that preceded the final regulation. The comments of immigration attorney Eugene J. Flynn in the proposed "known to the Government" regulations specifically raised the issue of the absence of a document from government files. Mr. Flynn commented " 'Known to the Government' can simply mean that there is actually something *missing* from the file that conclusively shows that an alien, on whatever date, was in violation of his status." (Emphasis added.) While the INS, in its Preamble to the final regulation, did not specifically address this issue, it did say that it had given "review and careful consideration [to] all comments" on the "known to the Government" proposal. 52 Fed. Reg. at 16206 (1987).

[26] The regulation was published in final form on May 1, 1987 [52 Fed. Reg. 16205, 16208 (1987)] and was amended slightly on November 17, 1989 [52 Fed. Reg. 43845 (1987)]. 8 C.F.R. §245a.1(d) provided that "[a]*s used in this chapter*," the term "government" in the clause "alien's unlawful status was known to the government" "means the Immigration and Naturalization Service." The regulation further states that "[a]n alien's unlawful status was 'known to the government' *only if*" that alien met one of three (and later four) enumerated standards, each requiring the *presence* of a document in the files of the INS. 8 C.F.R. §245a.1(d) (emphasis added). Under 8 C.F.R. §245a.2(b) *only* those aliens who fell within one of these enumerated "categories" could "file for adjustment to temporary residence status." *All others were prohibited.* There was no discretion on the part of the INS, under the terms of the regulation, to accept applications from aliens who did not meet the criteria. This necessarily precluded those who had §265 claims from applying, much less having their applications granted by the INS. *See* INS Legalization Manual (the Manual which contains the agency's binding instructions to its staff, LOs and QDEs) §IV-6 where it states that "[i]f there are major deficiencies in the application package *or if the applicant is statutorily ineligible, the application will be rejected.*" (Emphasis added.) The QDEs were also contractually required to implement the INS's legalization policies, and were prohibited from forwarding to the INS legalization applications that did not meet the agency's eligibility criteria. For these reasons, many §265 applicants

messages and letters,[27] and repeated, documented instances of INS advice to inquiring aliens and QDEs, consistently stating the position that §265 would not be considered a basis for legalization eligibility.[28] Thus, the INS had not only a final position, but one that had been refined and reiterated several times.

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were told by an LO or QDE that they would not be permitted even to file an application.

[27] The regulation defining the term "known to the Government" and codified at 8 C.F.R. §245a.1(d) was found by the district court to be "contrary to law" on March 30, 1988. Following the entry of this order, the INS filed with the court a copy of an official INS "Telegraphic Message" sent on April 15, 1988, to all Immigration Offices. This Message stated, *inter alia*:

> The instruction on the "known to the government" court standard is clarified as follows: *documentation* must have existed in one or more federal agencies so that when such *documentation* is taken as a whole it would warrant the finding that the nonimmigrant alien's status in the United States was unlawful. Such *documentation* must be in the files of the government prior to January 1, 1982. . . (emphasis added).

The INS, on April 13, 1988, also sent letters to all QDEs with similar statements concerning "documentation." These letters concluded with the statement that "the violation must be able to be induced from evidence submitted to Federal agencies only, and prior to January 1, 1982." (Emphasis added.)

The requirement of *documentation submitted to* a federal agency, necessarily precludes an alien from asserting a §265 claim under the "known to the Government" provision. It is the *absence* of documentation (that is, the knowing *failure* to file quarterly or annual reports prior to 1982) which puts a government agency on notice of unlawful status and thereby renders non-registrants eligible for legalization.

[28] *See* Declaration and Affidavits in Support of Plaintiffs' April 28, 1988 Notice of Evidence of Defendants' Failure to Comply with the Court's Orders and Renewal of Request to Toll May 4, 1988 Filing Deadline; Plaintiffs' April 29, 1988 Submission of Additional Declarations and Affidavits; Intervenor's Motion to Compel Compliance And/Or Modify Permanent Injunction (April 21, 1988). The district court on May 2, 1988 also heard oral argument and took live witness testimony from INS officials with respect to the §265 issue. Transcript of May 2, 1988 Status Call, pp. 32-42.

Furthermore, the question of whether the district court's definition of the term "known to the Government" encompassed §265 violations was a purely legal one, the consideration of which would not have benefitted from a more concrete factual setting. *See Thomas v. Union Carbide Agricultural Products Co., supra* at 581-582. Indeed, the question merely required a clarification of the scope of the district court's prior orders. As a question involving basic eligibility criteria, its resolution would certainly not have varied based upon the factual situation of a particular applicant. Thus, the INS' position on the §265 eligibility criterion more than satisfied the "fitness" prong of the *Abbott Laboratories* ripeness test.

Moreover, the compelling evidence of hardship to aliens and QDEs strongly militated in favor of speedy judicial review of the §265 policy. The INS set May 4, 1988 as the last date an alien could apply for legalization. For most of the application period, an INS regulation was in place which "appear[ed] to have precluded section 265 claims." *Ayuda I*, 880 F.2d at 1342, App. 111a-112a. Even after the district court invalidated that regulation, INS officials continued to recommend denial of legalization benefits to §265 applicants, consistent with the INS' original regulation defining "known to the Government." Even the *Ayuda* majority admits that INS officials "may well have told some section 265 claimants that if they applied (which required "a hefty $185" individual fee) the office would recommend that legalization be denied." *Ayuda II*, 948 F.2d at 751, App. 15a.[29] The aliens were thus presented with the traditional—and in this case tragic—dilemma which renders agency action ripe: they could heed the INS advice, not apply and risk forever losing this chance to legalize their status and receive work authorization, or they could file their applications notwithstanding the official ad-

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[29] In fact, the record shows that *every* INS official before whom the §265 issue was presented recommended denial of legalization benefits, consistent with the INS's original regulation defining "known to the Government."

vice, risking the "hefty" application fee[30] and, perhaps for the first time ever, "emerge from the shadows," (*McNary*, 111 S.Ct. at 891), to make their illegal presence known to the INS. The existence of the imminent deadline meant that the §265 issue *had* to be resolved while the aliens themselves still had the opportunity to proceed with their legalization applications and the QDEs and other community organizations could still advise the aliens as to whether to file such applications.

The *Ayuda* majority suggests that the §265 issue was not ripe because the LAU had not yet rendered a decision on this basis for eligibility. *See Ayuda II*, 948 F.2d at 754, App. 22a. But the flaw in this argument becomes obvious when considered in light of this Court's holding in *McNary* that Congress did not require exhaustion for legal challenges to INS policies. To defer a district court's assertion of jurisdiction until the plaintiffs' claims can be administratively decided by the LAU is to require mandatory exhaustion of those claims as a jurisdictional prerequisite—which is precisely the jurisdictional scheme that *McNary* rejected. Ripeness cannot be made subject to exhaustion where exhaustion is not required.

Furthermore, because the *Ayuda* majority's ripeness analysis is colored by its view that the district court had no jurisdiction under 8 U.S.C. §1255a(f) to entertain the challenge to §265, the majority disregards the urgency

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[30] As the district court found in its original March 30, 1988 order:

> The testimony shows that the individual plaintiffs are generally people without extensive financial resources. They will have a hard time paying the application fee. It would be foolhardy for many of them to pay the filing fee while faced with INS "known to the Government" regulation - which makes it quite clear that they will place their money at great risk. Hence, if the status quo continues, most of them will not apply for legalization. If an otherwise eligible alien does not submit an application prior to May 4, 1988, he or she may well be forever barred from applying for legalization. . . .

Ayuda v. Meese, 687 F.Supp. at 665-66, App. 236a.

created by the application deadline and fails to accord the deadline sufficient weight in its hardship analysis. The majority's ripeness analysis essentially presupposes that *McNary* does not apply, and that the aliens were required to exhaust administrative remedies, *Ayuda II*, 948 F.2d at 754, App. 22a. Thus, in the majority's framework, the impending deadline itself would pose little hardship, as the §265 issue was most likely not capable of administrative and judicial resolution in time to aid other applicants and QDEs in resolving their dilemma.

Only when it is recognized that the district court had the authority to render a decision on the §265 issue prior to the deadline does the hardship prong of the ripeness test come into sharp focus. For if, as *McNary* plainly suggests, the district court had the power to hear the challenge and afford appropriate relief, it could act quickly to enjoin the INS from implementing its unlawful policy and order the communication of its decision in a timely fashion. In these circumstances, withholding such judicial consideration from aliens and QDEs with very little time to make a very significant—indeed life-changing—decision would have created immediate and inestimable hardship.

CONCLUSION

For all the above reasons, Petitioners request that their Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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